

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**Washington, D.C.**

STARBUCK CORPORATION d/b/a  
STARBUKS COFFEE COMPANY

Case No. 02-CA-037548  
(on remand from 679 F.3d 70  
(2d Cir., May 2012)

and

LOCAL 660, INDUSTRIAL WORKERS  
OF THE WORLD

**ACTING GENERAL COUNSEL'S STATEMENT OF POSITION  
TO THE BOARD ON REMAND**

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## I. INTRODUCTION

Pursuant to the Board's request for Statements of Position dated October 31, 2012 and in conformance with Section 102.46(j) of the Board's Rules and Regulations, Counsel for the Acting General Counsel submits this Statement of Position with respect to the issues raised by the remand in *NLRB v. Starbucks Corporation d/b/a Starbucks Coffee Co.*, 679 F.3d 70 (2d Cir. May 10, 2012) (*Starbucks Corporation*), granting enforcement in part, denying enforcement in part, and remanding in part, 355 NLRB No. 135 (2010), incorporating by reference, 354 NLRB 876 (2009); judgment entered May 2012; Board Case No. 2-CA-37548.

The Court (Circuit Judge Newman, joined by Circuit Judges Winter and Katzmann) enforced the Board's Order only as to the unfair labor practices not challenged by Starbucks. *Starbucks Corporation*, 679 F.3d at 72, 82. The Court rejected the Board's findings that Starbucks violated the Act by: (1) prohibiting its employees from wearing more than one union button while working; (2) discharging Daniel Gross; and (3) discharging Joseph Agins. Specifically, as to the discharge of Agins, the Court found that the Board improperly used the *Atlantic Steel*<sup>1</sup> test to assess whether Agins' outburst during the course of protected activity was protected. The Court reasoned that when the Board formulated the *Atlantic Steel* test, it was only considering scenarios in which an employee engaged in questionable conduct in a "nonpublic" place, such as the shop floor or in a break room. The Court found that the Board disregarded the concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers. *Id.* at 79.

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<sup>1</sup> 245 NLRB 814, 816 (1979).

The Court remanded the Agins' discharge to the Board to consider an appropriate standard to apply when assessing whether Agins' outburst during the course of protected activity was protected. With regard to the remaining allegations, the Court granted Starbucks' cross-petition and denied enforcement as to the union button issue and the discharge of Gross..

In light of the Court's remand, Counsel for the Acting General Counsel urges the Board adopt the "grossly or seriously disruptive" standard articulated in *Saddle West Restaurant* to determine whether Agins's conduct was reasonably likely to disturb the customer-salesperson relationship. *Saddle West Restaurant*, 269 NLRB 1027, 1042 (1984). Counsel for the Acting General Counsel contends that given the size of the group that entered the coffee-house; the length of the disruption; the lack of customer complaints; the lack of disruption to service; the fact that Respondent provoked the exchange; and that both Agins and the store manager used profanity during the verbal argument, Agins' conduct caused minimal, if any, disruption to the operation of Starbucks' business.

Counsel for the Acting General Counsel contends that the Board should find that Respondent discharged Agins in violation of Section 8(a)(1) and (3) because Agins' conduct – the use of profanity in a restaurant in the presence of customers - clearly was not "grossly or seriously disruptive" to the business operations of Starbucks and thus, he should not lose the protection of the Act. *Id.* Alternatively, under *Wright Line*,<sup>2</sup> Counsel for the Acting General Counsel maintains that the preponderance of the evidence shows that Respondent discharged Agins because of his union activities and that it failed to

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<sup>2</sup> 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

carry its burden of showing that Agins would have been fired absent his protected activities.

## II. PROCEDURAL HISTORY

From 2004 to 2007, the Industrial Workers of the World (“IWW”) engaged in a highly visible campaign to organize employees in four Starbucks stores. *Starbucks Corporation.*, *supra* at 72. Among other efforts, union supporters held protests, attempted to recruit “partners,”<sup>3</sup> and made numerous public statements to the media. In response, Starbucks mounted an anti-union campaign aimed at tracking and restricting the growth of pro-union sentiment. In the course of this campaign, Starbucks employed a number of restrictive and illegal policies. These included prohibiting employees from discussing the union or the terms and conditions of their employment; prohibiting the posting of union material on bulletin boards in employee areas; preventing off-duty employees from entering the back area of one of the stores; and discriminating against pro-union employees regarding work opportunities. *Id.* at 72.

Seven unfair labor practice charges were filed between March 14 and August 7, 2006. On June 12, 2007, the Regional Director issued an order further consolidating cases, consolidated complaint and notice of hearing (“the complaint”) against Starbucks. In relevant part to the remand issue, the consolidated complaint alleged that on or about December 12, 2005, Starbucks discharged Joseph Agins, Jr. at its 145 Second Avenue Manhattan facility because he engaged in protected, concerted activity.

A twenty day hearing was held before Administrative Law Judge (“ALJ” or “the judge”) Mindy Landow between July 9 and October 25, 2007. On December 19, 2008,

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<sup>3</sup> Starbucks retail stores are staffed by two classes of wage employees: “baristas” and shift supervisors. Both types of employees are described internally as “partners.” *Id.* at 72, n. 1.

the judge issued her Decision and Recommended Order finding that Respondent committed numerous violations of the National Labor Relations Act (“the Act”) in response to the public organizing efforts of its employees. In relevant part to the remand issue, the judge found that Starbucks used protected activity to justify the discharge of pro-union employee Joseph Agins. The judge found that Agins and his companions were engaged in concerted protected activity when they were in the store while wearing union buttons and that Agins’ argument with Assistant Store Manager (“ASM”) Ifran Yablon took place in the overall context of that protected activity and was thus protected. 354 NLRB at 904. ALJ Landow found that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Agins on December 12, 2005.

In assessing the impact of Agins’ conduct, the judge applied the Board’s four-factor balancing test set forth in *Atlantic Steel Co.*, to determine whether Agins’ conduct in the course of his argument with Yablon was sufficiently egregious to lose the Act’s protection.

Applying the first factor, the judge found that the location of the incident, a retail facility where the argument with Yablon could be overheard by employees and customers, weighed against protection. 354 NLRB at 906. With respect to the subject matter of the discussion, the judge reiterated that the argument took place in the overall context of protected activity, thus weighing in favor of protection. *Id.* at 906-907. The judge found that the third factor, the nature of the outburst, militated toward retaining the protection of the Act, notwithstanding that Agins engaged in disruptive conduct and used profanity, because Yablon goaded Agins into the argument, the incident was brief, and there was record evidence of other employees who used profanity and slurs at work and

were dealt with less harshly. *Id.* at 907. Finally, the judge found that although the incident was not prompted by unlawful conduct, the absence of cognizable provocation at most weighed only slightly against continued protection, because Agins and his companions were under the reasonable belief that the policy they were protesting was unlawful. *Id.* at 907.

The judge found that on balance, Agins' conduct, while unwise and intemperate, was not so egregious so as to lose the Act's protections. *Id.* The judge also analyzed the discharge under the *Wright Line* standard and found the discharge unlawful on that basis as well. *Id.* at 903-909.

The Board agreed with the judge's application of the *Atlantic Steel* test and found it unnecessary to reach the *Wright Line* analysis. Accordingly, the Board ordered Starbucks to reinstate Agins and make him whole. 355 NLRB at slip op. at 1.

A petition to enforce the Board's decision and order was filed on August 27, 2010. Starbucks filed a cross-petition to review the decision on September 21, 2010. Specifically, in relevant part to the remand issue, Starbucks sought court review of the Board's decisions regarding Agins' discharge. The Second Circuit granted Starbucks' cross-petition and remanded the issue of Agins' discharge to the Board for further proceedings. *Starbucks Corporation, supra* at 72.

The Court concluded that the *Atlantic Steel* four-factor test was inapplicable to the situation where an employee who, while discussing employment issues, utters obscenities in the presence of an employer's customers. The Court remanded to the Board to consider what standard is applicable in the situation where an employee who, while discussing employment issues, utters obscenities in the presence of an employer's

customers. In so doing, the court left it to the Board to consider whether an outburst in the presence of customers loses otherwise available protection if the employee is off duty although on the employer's premises or if the employee is identifiable as an employee (i.e. in uniform) to the customers.

By memorandum dated August 16, 2012, the Acting General Counsel recommended the Board not seek *certiorari*, but accept the partial remand to reconsider the discharge of Joseph Agins to determine the standard that should apply in evaluating the Section 7 protection afforded an employee who, while discussing employment issues, utters obscenities in the presence of customers.

By letter dated October 31, 2012, the Office of the Executive Secretary informed the parties the Board had accepted the partial remand from the Second Circuit and requested the parties submit statements of positions.

### III. FACTS

#### A. Agins' Sustained Protected Concerted Activities.

Beginning in May 2004, Joseph Agins worked at Starbucks's 9th Street store as a barista. *Starbucks Corporation, supra* at 73. On May 28, 2005,<sup>4</sup> a letter was presented to Tanya James, the Assistant Store Manager ("ASM") for the 9<sup>th</sup> Street Store, which identified Agins and several other partners as members of the IWW. 354 NLRB at 883. Subsequently, beginning in June 2005, Agins became a vocal union supporter, and was identified as such by management in internal communications. *Starbucks Corporation, supra* at 73.

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<sup>4</sup> All dates are in 2005, unless otherwise noted.

B. Agins Engaged in Protected Concerted Activity in June 2005.

On one occasion in June, Agins and several companions distributed fliers in front of the Starbucks store located on 17<sup>th</sup> Street and First Avenue promoting an upcoming union demonstration at the store scheduled for June 18. 354 NLRB at 883. While the group distributed fliers, the police arrived at the store. The officers informed the group that the sidewalk was private property and that the union was not allowed to distribute fliers there. *Id.* The group left the area and verified with the clerk at the rental office of the apartment complex where the Starbucks facility was located and were told that the sidewalk was public property. *Id.* Consequently, the group returned to the store and continued to distribute fliers promoting the upcoming demonstration. 354 NLRB at 883. Although the police were again summoned, the officers permitted the group to continue distributing fliers. *Id.*

On June 18, a second demonstration was held at the 17th Street store. It lasted for about 3 hours and there were approximately 20 to 30 demonstrators present. *Id.* Again, the demonstrators wore union insignia, chanted, held picket signs, and distributed leaflets. *Id.* At about 3 p.m., they proceeded to the 9th Street store where they encountered DM Will Smith and Julian Warner, the Store Manager (“SM”) for the 9<sup>th</sup> street store, accompanied by several police officers. Initially, the group was told they could not picket or leaflet, but the police apparently changed their position, because the demonstration proceeded. *Id.* Agins, who was working that afternoon, joined the group once his shift was completed. *Id.*

Agins handed out flyers outside his store on other occasions in June 2005. (Trial Tr. 912).<sup>5</sup> He would reach out to customers and explain to them that he was part of the IWW. He would explain to the customers and passersby what was going on with the union organizing drive at the store. (Trial Tr. 912). Agins also handed out leaflets on approximately twenty other occasions at various other Starbucks locations. (Trial Tr. 920). On these occasions, he observed various managers at these stores including ASM Tanya James, SM Julian Warner and DM Vivian Higgabotom. (Trial Tr. 914). On two occasions during this time period, Agins discussed his union affiliation with SM Warner. (Trial Tr. 905-906, 920-922). Warner's attitude and conduct towards Agins changed completely from friendly to less friendly after Agins' union support became known. (Trial Tr. 925, 926).

C. Agins Engaged in Protected Activity in August 2005.

In August 2005, Agins attended a Starbucks promotional event at the South Street Seaport with other union members and supporters from the IWW. (Trial Tr. 939); 354 NLRB at 900. Agins and at least two or three others, including Agins' father, Joseph Agins Sr. were wearing union buttons, union hats or other union insignia. (Trial Tr. 940); 354 NLRB at 900. The promotion consisted of a march around the South Street Seaport on behalf of Ethos Water, a new Starbucks vendor. Agins recalled that he and the other IWW supporters brought leaflets and attempted to hand them out. (Trial Tr. 940-941). Starbucks management monitored Agins' union activities on that occasion and reported on them. An e-mail dated August 8, 2005 from SM Warner to DM Smith reports that Agins was seen distributing union flyers at the Ethos event. (G.C. Ex. 101). At the Ethos

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<sup>5</sup> Although this transcript citation and those that follow were not cited in the decision by the ALJ, they are part of the certified record before the 2<sup>nd</sup> Circuit Court which includes the underlying transcript.

event, Agins saw Warner and saw an individual whose name he later learned was Ifran Yablon, a store manager at Starbucks' Upper West Side store who occasionally visited the 2<sup>nd</sup> and 9<sup>th</sup> store as a customer. (Trial Tr. 941); 354 NLRB at 900. At the Ethos event in August, Agins' father was wearing a black IWW cap. (Trial Tr. 940); 354 NLRB at 900. Agins saw Yablon approach his father and say something. (Trial Tr. 942); 354 NLRB at 900. Agins learned that Yablon stated, "Look at that old bastard-he's with the union, IWW". (Trial Tr. 943); 354 NLRB at 900.

D. Starbucks Orders Employees to Remove Union Buttons.

On November 20, 2005, Peter Montalbano, a Barista, worked the evening shift at the 9<sup>th</sup> street store. (Trial Tr. 1499). Sometime after 5 p.m., DM Smith bid Montalbano goodnight and exited store. (Trial Tr. 1499-1500). After Smith left the store, Montalbano explained to Carol Livensperger, a coworker, agreed to each put on one union pin (Trial Tr. 1500). Later that evening, Smith returned to the store. (Trial Tr. 1501). Smith approached Montalbano and Livensperger and asked them into the back room. Then Smith ordered them to either remove the union pins or go home. (Trial Tr. 1501). Montalbano and Livensperger took the union pins off and returned to work. (Trial Tr. 1502).

Subsequently, Montalbano discussed the pins issue with the members of the Union (Trial Tr. 1503). Montalbano told them that the workers at his store were not allowed to wear union pins. The Union decided that Montalbano would attempt to wear the pin on November 21, 2005. The Union agreed that a delegation of workers from Union Square would visit Montalbano's store that evening to support him. (Trial Tr. 548, 1503).

E. Agins Engaged in Protected Activity on November 21.

On November 21, 2005, Agins and several other off-duty employees entered the 9th Street store to show support for on-duty workers who had been instructed, pursuant to the prior policy, to remove their pro-union pins. 354 NLRB at 900. The group consisted of no more than five individuals including off duty employees Joe Agins; Tomer Malchi; Suley Ayala; Ivan Hicapie, and Suley Ayala's sister, Daisy Ayala, a non-employee. (Trial Tr. 547-548, 691, 693, 799, 1503). Agins and his companions were wearing union t-shirts, caps, and insignia, including pro-union pins and buttons. (Trial Tr. 548, 930, 2030); *Starbucks Corporation* at 73. The group entered the store and sat down. (Trial Tr. 931, 2001). Ayala and her sister went to the bathroom. (Trial Tr. 800-801). Business was slow that evening. (Trial Tr. 775, 870, 1504). There were less than ten customers in the store (Trial Tr. 1504).

Shortly after the group entered the store, Agins was approached by Ifran Yablon, an off-duty manager, who happened to be a customer at the 9th Street store. *Starbucks Corporation, supra* at 73. There was bad blood between the two. At an IWW rally several months before, Yablon had allegedly made derogatory remarks to Agins' father about the father's support for the IWW. *Id.* at 73.

Yablon engaged Agins in a conversation about his union pin and whether Starbucks employees really needed a union. (Trial Tr. 2002); 354 NLRB at 900. Yablon told Agins that employees did not need a union because they had health benefits, a 401(k) plan, and stock options. He made some reference to the Starbucks mission statement. Yablon stated that the Union only worries about business and taking dues from members and not defending workers. 354 NLRB at 901. At some point, Agins spoke of Yablon's

alleged insult to his father, and the conversation became heated. *Starbucks Corporation, supra* at 74. Both men used hand gestures, spoke loudly, and used obscenities. (Trial Tr. 870, 938-939); *Id.* at 74. Agins admitted that he told Yablon, “You can go fuck yourself, if you want to fuck me up, go ahead, I’m here.” Agins’ fellow supporters then intervened to stop the argument, and he withdrew with them to a table. *Id.* at 74. At that point, ASM James approached Yablon and told him to “leave it alone.” *Id.* at 74. The incident lasted no more than five to ten minutes. (Trial Tr. 696). Yablon then left the store, and James went over to the table and admonished Agins. He listened to her and did not utter obscenities or make threatening gestures toward her. Agins and his companions left the store approximately ten minutes later. *Id.* at 74. The police was not called. 354 NLRB at 906.

F. Agins Engaged in Protected Concerted Activities on Black Friday.

On November 25,<sup>6</sup> the Union held a demonstration in front of the Union Square store in protest of management’s refusal to meet with the union after the store went public and the unfair labor practices charges pending at the Board. 354 NLRB 884. The demonstration began at approximately seven a.m. *Id.* By about six p.m., the demonstrators totaled thirty to fifty people. *Id.* The demonstrators included Agins and other former and current workers from Starbucks. *Id.* The demonstrators chanted and held picket signs. *Id.* One sign read Starbucks Workers’ Union and had the union logo. The other signs read corporate irresponsible; Starbucks being irresponsible; and union busting since 1982. (Trial Tr. 562). At the time, Jim McDermet, the Regional Vice President of the New York Metro Region, Wendy Beckman, a Regional Manager, Kim Vertrano, a District Manager, and Michael Quintero, a Store Manager, were sitting

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<sup>6</sup> This date is also referred to as Black Friday.

together at a table inside the front of the store. 354 NLRB at 884. The demonstrators also held a press conference that day. *Id.* Agins was among the demonstrators who spoke to the press. (Trial Tr. 563, 1514).

G. December 12 Meeting Where Agins is Terminated.

On December 12, 2005, when Agins came into work, he was asked to sit at the rear of the store with two managers. They informed him that he was being discharged for disrupting business. *Starbucks Corporation, supra* at 74. A subsequent document filed by Agins' District Manager stated that Agins would be ineligible for rehire because “[p]artner was insubordinate and threatened the store manager. Partner strongly support [sic] the IWW union.” *Id.* at 74.

#### IV. ARGUMENT

- A. The Board should adopt the “grossly or seriously disruptive” standard to determine whether Agins’ conduct on November 21<sup>st</sup> caused him to lose the protection of the Act.

The record establishes that Joseph Agins was involved in protected concerted activity, i.e. organization activity which implicates core Section 7 rights, at Respondent’s facility when he engaged in a verbal exchange with manager Yablon. The exchange between Agins and manager Yablon took place in the context of a demonstration in support of employees’ Section 7 rights, namely the right to wear union buttons.

The Board has traditionally recognized that special rules, differentiated from those considered applicable within manufacturing plants, apply to retail enterprises with respect to the right of employees to engage in union-related or concerted activity on their employer's premises. *Saddle West Restaurant*, 269 NLRB at 1042. Specifically, the

Board has recognized that the nature of retail establishments, including restaurants, requires that an atmosphere be maintained in which customers' needs can be effectively attended to. *Id.* The Board has recognized that in those circumstances, there is an inherent tension between an employee's interest in exercising rights that are presumptively protected by Section 7 of the Act, and the employer's interest in maintaining discipline and operating an efficient and profitable business. *Id.* In an attempt at striking a balance between these competing interests, the Board has articulated that union-related or concerted activity taking place in the presence of customers is protected unless it is grossly or seriously disruptive and therefore reasonably likely to disturb the retail customer-salesperson relationship. *Id.* See also *G.T.A. Enterprises, Inc. d/b/a Restaurant Horikawa*, 260 NLRB 197 (1982); *Thalassa Restaurant*, 356 NLRB No. 129 (2011); *Station Casinos, LLC*, 358 NLRB No. 153, *slip op* 3, n. 16, & 75 (2012).

When determining whether union-related or concerted activity taking place in the presence of customers is protected or seriously disruptive, the Board looks at a host of factors which can be described as the “totality of circumstances.” The factors the Board considers include: whether customers had a reasonable expectation of quiet enjoyment or a peaceful environment in light of the type of establishment or setting; whether the conduct actually interfered with customers’ enjoyment; whether patrons complained about the disturbance; whether the conduct interfered with actual operations or delivery of service; the duration of the disturbance; the number of customers present (whether service was at a peak or lull); whether the conduct was noisy; the size of group involved; whether threats, violence, or damage occurred; whether profanity was used; whether any impulsive outburst was provoked; and whether the employer initiated the confrontation in

the public setting.<sup>7</sup> See *Station Casinos, LLC*, *supra* at 75; *Goya Foods of Fla.*, 347 NLRB 1118, 1133-34 (2006), *enforced*, 525 F.3d 1117 (11th Cir. 2008); *Burger King Corp.*, 265 NLRB 1507, 1509-1510 (1982), *enforced in part*, 725 F.2d 1053 (6th Cir. 1984); *Saddle West Rest.*, *supra* at 1041-43; *Restaurant Horikawa*, *supra* at 197.

Applying the recommended standard to the instant case, as set forth below, the evidence establishes that Agins did not engage in grossly or seriously disruptive conduct and the totality of the circumstances suggest his conduct should retain its protection under the Act.

a) Size of Group

Here, specifically, Agins entered Starbucks with only four other individuals. (Trial Tr. 542-548, 691, 693, 799, 1503). Upon entering Starbucks, two members of the group went to the bathroom. The others, with the exception of Agins, sat down at a table and did not engage in any conduct that was grossly or seriously disruptive. See *Thalassa Restaurant*, *supra* at 1, fn. 3, & 19-20 (employee who came to restaurant with 20-25 people to deliver a letter engaged in protected activity--group behaved in an orderly manner and conduct was not seriously disruptive). Thus, the size of the group militates toward Agins retaining the protection of the Act.

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<sup>7</sup> Cases involving misconduct in front of customers have not hinged on whether the employees are on or off duty or whether the customers would identify them as employees. The Board has not considered an employee's attire a factor in these cases. See *Crowne Plaza Laguardia*, 357 NLRB No. 95 (2011) (employees who sought to present petition to manager in uniform after they punched in, but several minutes before shift start time, protected); *Goya Foods*, 347 NLRB at 1134 (off-duty employees protected while wearing shirts identifying their employer while delivering letter to neutral employer); *Horikawa Rest.*, 260 NLRB at 197 (off-duty employee unprotected; evidence that employees used restaurant while not working did not justify participation of employee in mass demonstration inside restaurant); *Traverse City Osteopathic Hosp.*, 260 NLRB 1061, 1061-62 (1982) (nonworking time weighed in favor of protection, where outburst occurred in hospital cafeteria, not patient-care area). However, if the Board should decide to take these factors into account, they should undoubtedly weigh in favor of Agins retaining the protection of the Act since he was off-duty and not identifiable as an employee, i.e. wearing a uniform. Additionally, there is no evidence that Yablon was identifiable as an employee. Customers could not have known that the verbal argument between Yablon and Agins was that of two employees.

b) Length of disruption

The argument between Agins and Yablon lasted no more than five to ten minutes. (Trial Tr. 696). Agins' outburst was relatively brief. 354 NLRB at 907. The group voluntarily left the store shortly after the argument. Any potential disruption to the employer's operation was of short duration and did not appreciably interfere with the activities of the store. *See Saddle West Restaurant, supra* (employee's "notably brief" confrontational remark to coworkers about boycotting the restaurant attached to casino's employer's establishment found not "flagrantly disruptive" where there was no evidence patron overheard the conversation or that it created a disturbance).

Agins' conduct vastly differs from the conduct of the employees in *Burger King*. In *Burger King*, a group of twenty employees and other individuals entered the restaurant following which two employees demanded recognition in a boisterous, disorderly, physically intimidating manner. 265 NLRB at 1507. The employees chanted for 20 minutes and refused to leave. Management had to close the restaurant. As a direct result of the protester's activities, the restaurant's operations ceased for over an hour at peak time, diners had to leave the restaurant, prospective diners were turned away, and the participants did not leave when asked to do so and only vacated the restaurant when the police arrived. The Board adopted the judge's finding that this conduct seriously disruptive the business and was not protected. *Id.*

Thus, the length of the disruption militates toward Agins retaining the protection of the Act.

### c) Customer Complaints

The record indicates that the business was slow and the store was fairly empty during the incident. Less than ten customers may have been present within the coffee-house during Agins' encounter with Yablon, presumptively within hearing distance. (Trial Tr. 1504). However, the record provides no persuasive evidence that warrants a finding that those customers, regardless of their number or location within the facility, heard the argument between Agins and Yablon. The record can hardly be considered clear or yield a definitive conclusion that customers heard the exchange. None of the witnesses who testified cited to any customer reactions of which they were aware.<sup>8</sup> Moreover, there is no evidence in the record that any customers complained about the incident. In *Saddle West Restaurant.*, *supra* at 1041-43, the Board adopted the administrative law judge's finding that the lack of customer complaints or complaints by the restaurant and the absence of evidence that patrons overheard the verbal exchange, supported a finding that the discriminatee had not acted in a flagrantly disruptive manner so as to lose the protection of the Act.

The instant situation varies greatly from *Restaurant Horikawa* where a thirty person group entered a crowded restaurant chanting and parading boisterously about the dining area during the dinner hour for ten to fifteen minutes. Before reaching the dining area, the group pushed through the reception area where customers were waiting to be seating. The restaurant was full or near capacity. The Board found that by invading the restaurant

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<sup>8</sup> Tanya James testified that Agins' conduct scared the customers. (Trial Tr. 2005). She also testified that Agins cursed and yelled at her and that she had to back away from him. (Trial Tr. 2003-2004). ALJ Landow did not credit James' testimony. 354 NLRB at 906. ALJ Landow found Respondent's version of events exaggerated and mischaracterized the scope and nature of Agins' misconduct on November 21. 354 NLRB at 909.

en masse during the dinner hour when patronage was at or near its peak, the group seriously disrupted the employer's business. The Bound further found that the demonstration interfered with the employer's ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion. *Restaurant Horikawa, supra* at 197-99. In the case herein, the group was orderly, the demonstration did not disrupt or interrupt the operation of the restaurant, inconvenience to diners was virtually nonexistent, and the demonstrators settled down when asked to do so.

Tomer Malchi, a member of the group, testified that he did not hear the nature of the argument from where he was sitting in the café. (Trial Tr. 549, 550, 695, 932-933); 354 NLRB 901. Even assuming customers may have noticed the verbal altercation between Agins and the manager-customer, this is insufficient to show that the incident so disturbed the Respondent's business or customers' quiet enjoyment in this casual coffee-house setting<sup>9</sup> as to justify removing Agins from the Act's protection. *See Goya Foods, supra* at 1133-34 (employees did not lose protection of Act despite customers' noticed of their demonstration while continuing to shop and having their purchases processed).

Thus, the lack of customer complaints militates toward Agins retaining the protection of the Act.

d) Use of profanity/Provocation by Employer

While Agins did engage in conduct which included the use of profanity, it was not extreme or prolonged. 354 NLRB at 906. Offensive language in front of customers or on the retail floor does not necessarily lose the protection of the Act. *See, e.g., Walmart*

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<sup>9</sup> In *Goya Food, supra* at 1134, the ALJ distinguished a busy supermarket from restaurants where there is a "normal expectation of quiet enjoyment". Starbucks is a coffeehouse chain which does not offer table service. Arguably, Starbucks is a fast-food, casual restaurant where the expectation of quiet enjoyment is less than what is expected at regular restaurants.

*Stores, Inc.*, 341 NLRB 796, 808 (2004), *enforced*, 137 Fed. Appx. 360 (D.C. Cir. 2005) (use of “shit” and “bullshit” in retail area of the store in conversation with supervisor); *Neff-Perkins Co.*, 315 NLRB 1229, 1231-32 (1994) (employee used terms “shitty” and “sucks” in front of a customer who was present at a workplace meeting); *Traverse City Osteopathic Hosp.*, 260 NLRB 1061, 1061-62 (1982) (profane outburst, “brown-nosing suck-ass”, in hospital cafeteria where few visitors present protected). In addition, “it is more than likely that this was neither the first, nor the last, heated discussion or importune use of profanity to take place” at this public facility. 354 NLRB at 906. The evidence shows that other employees of Respondent have used profanity, including racial and ethnic slurs, when not engaged in protected activity, and they have been dealt with less harshly. (G.C. Ex. 66-76); 354 NLRB at 907, n. 55. Notably, ALJ Landow found that Agins’ use of profanity on this occasion was not of such an egregious nature so as to cause him to lose the protection of the Act. 354 NLRB 907.

Further, the evidence shows that it was Yablon who provoked the argument in the customer area. The conversation in question was initiated by Yablon who commented on the union button and voiced his objections to the Union. (Tr. 934, 1506, 2002). Further, he too used profanity during the heated conversation. (Trial Tr. 870, 938-939); *Starbucks Corporation, supra* at 74. Thus, Respondent can hardly complain that guests were exposed to this language solely on account of Agins’ behavior. *See Brunswick Food & Drug*, 284 NLRB 663, 663 (1987), *enforced mem.*, 859 F.2d 927 (11<sup>th</sup> Cir. 1988) (employer “selected the setting for this confrontation, and it is thus hardly in a position to object that customers were drawn into it”). *See also K Mart Corp.*, 313 NLRB 50, 57 & n.19 (1993) (even if union agent-handbiller said “fuck you” to customer, incident not so

egregious as to defeat Act's protection where customer provoked the handbiller, and customer did not file a complaint, although police were called).

Moreover, the Board has found more egregious language to be protected, including vulgar name-calling toward supervisors. *See, e.g., Stanford Hotel*, 344 NLRB 558, 558-59 (2005) (calling supervisor a "liar and a bitch" and a "fucking son of a bitch" not so opprobrious as to cost the employee the protection of the Act); *Alcoa, Inc.*, 352 NLRB 1222, 1226 (2008) (reference to supervisor as an "egotistical fucker" did not weigh against protection).

Thus, the fact that the employer provoked Agins' outburst militates toward Agins retaining the protection of the Act.

e) Disruption in operation

There is no evidence in the record that warrants a determination that Agins' argument with Yablon, was sufficiently disruptive to remove him from the statute's protective compass. The evidence indicates that it was a slow evening. There is no evidence that any customer was at the cash registers or failed to receive service. The customers that were present during this incident were sitting in various locations in the café. The police were not called nor was the store closed at any period during the incident. 354 NLRB at 906. Even if the exchange between Agins and Yablon involved bickering and dissension, nothing in the record suggests that it had, or could have, interfered with Respondent's operations.<sup>10</sup> Nor could any determination be considered warranted that the Agins-Yablon argument would have been "inherently" likely to disturb the "efficient

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<sup>10</sup> The case herein is unlike *Stuart F. Cooper Co.*, 136 NLRB 142, 144-145 (1962), wherein this Board found that "persistent" bickering and dissension for which particular employees were clearly responsible had interfered with the concerned employer's production.

operation” of Respondent's business. *See Caterpillar Tractor Co. v. NLRB*, 230 F.2d 357 (7th Cir. 1956).

The Board has consistently held that a concerned employer's professed “belief” regarding a particular employer's suspected misconduct cannot be relied on to justify a discharge-motivated, *prima facie*, by statutorily proscribed considerations-without some proof that the employer's claimed belief had some reasonably well-grounded *factual* basis. No such showing has been made herein. In short, without proof of genuinely disruptive conduct, chargeable to Agins, which took place within Respondent's defined premises, or, which interfered proximately with Starbucks’ operations, no determination would be warranted that Agins had conducted himself in such an offensive or flagrantly obnoxious manner as to “depart from the *res gestae* of concerted activity and expose himself to an area beyond” Section 7's protective reach. *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), *enfd.* 351 F.2d 585 (7th Cir. 1965). *See also Union Carbide Corp.*, 171 NLRB 1651, n. 1 (1968).

Thus, the fact that there was no disruption to the business militates toward Agins retaining the protection of the Act.

*B.* Alternatively, the Board should adopt the judge’s alternative finding that Agins’ discharge was unlawful under *Wright Line*.

In the alternative, Counsel for the Acting General Counsel urges that the Board adopt the judge’s alternative finding that Agins’ discharge was unlawful because the real reason for his discharge was his prior union activities, not for the incident on November 21. Although, the Board declined to reach this issue in the first two decisions,<sup>11</sup> the scope of

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<sup>11</sup> 354 NLRB at 876, fn. 5; 355 NLRB at slip op. at 1, fn. 3.

the remand does not appear to preclude the Board from considering an alternative finding under *Wright Line*.

Where it is undisputed that an employee was discharged for alleged misconduct occurring while in the midst of protected activity, the sole question is whether the misconduct caused the employee to lose the protection of the Act while engaging in those activities. However, when motive for the employer's adverse action is disputed, *Wright Line* applies, even after the Board determines that an employee lost the protection of the Act. See *Caterpillar, Inc.*, 322 NLRB 674, 678 (1996), *remanded for consideration of settlement agreement*, 138 F.3d 1105 (7th Cir. 1998) (even assuming employee's conduct during grievance meeting caused loss of protection of the Act, discharge would still have been unlawful under *Wright Line*).

If an employer seizes upon conduct that lost the protection of the Act to justify its discharge decision, but that reason is a pretext designed to conceal retaliation for prior protected activities, then the discharge is unlawful. *Traverse City Osteopathic Hosp.*, *supra* at 1061-62. Thus, *Wright Line* is relevant to the question of which conduct motivated the employment action-the misconduct (that lost the protection of the Act) or the protected activities. In *Traverse City Osteopathic Hosp.*, the employer terminated an employee for stating, "if you want to be a brown-nosing suck-ass, you can, but I'm not going to be and I never will be one" to a coworker while discussing unionization in a hospital cafeteria. The Board adopted the decision of the administrative law judge finding that the employer seized on the profane outburst as a pretext for ridding itself of an active supporter of unionization. *Id.* In addition, the Board found that the employee did not lose protection during the outburst since few visitors were in the cafeteria at the

time and there was no evidence of complaints regarding the incident. *See also Mini-Togs, Inc.*, 304 NLRB 644, 644-46 (1991), *enforcement denied in relevant part*, 980 F.2d 1027 (5th Cir. 1993) (employer seized upon use of obscene language to discharge union supporter as a pretext; in addition, employee did not lose protection of the Act); *Aroostook*, 317 NLRB 218, 220, n.7 (1995) (Member Cohen concurring) (regardless of whether employee complaints in front of patients were protected, terminations unlawful where motivated by prior protected activity); *St. Margaret Mercy Healthcare Ctrs.*, 350 NLRB 203, 204-05 (2007), *enforced*, 519 F.3d 373 (7th Cir. 2008) (employee's conversation with other nurses about wages in vicinity of patient's room not of "such serious character as to lose the protection of the Act" where patient care was not the reason for the threat of unspecified reprisals); *Crawford House*, 238 NLRB 410, 420, 424-25, 428, 435 (1978) (discharge of employee based primarily for swearing at a patient found unlawful where it was pretextual).

Here, the motive for Agins' discharge is in dispute, as Counsel for the Acting General Counsel asserts that Agins was actually discharged for his prior union activities, not for the incident on November 21, and thus, a *Wright Line* analysis is appropriate.

As discussed above, Agins was a particularly open and active IWW Starbucks union member. He participated in major actions such as the demonstrations in June 2005 at the Second and 9<sup>th</sup> Street store and at the 17<sup>th</sup> and First Avenue store. (Trial Tr. 913, 1487); 354 NLRB at 883. He engaged in leafleting for the Union numerous times at numerous stores. (Trial Tr. 912, 916-920). It is clear beyond doubt that Respondent was aware of his union activities. 354 NLRB at 908. He testified without contradiction that managers were present and observed him on many occasions when he distributed flyers at many of

Respondent's stores during the summer and fall of 2005. (Trial Tr. 914-915). Agins' uncontradicted testimony is that he twice initiated conversations with SM Julian Warner to inform Warner of his union support. (Trial Tr. 920-922). His credible testimony is that Warner's attitude and conduct towards him changed completely from very friendly to less than friendly after Agins' union support became known. (Trial Tr. 925, 926).

As noted above, Agins was one of those IWW activists monitored by Respondent as part of its monthly and weekly recaps of union activity in the New York Metro Area. (Trial Tr. 2535-2536). Pursuant to this program, Warner reported Agins' presence with other IWW supporters, distributing union flyers at the August 3, 2005 Ethos Water promotion (Trial Tr. 1839-1840, 2526; GC Ex. 101, CP Ex. 11). When DM Smith received this information he immediately reported it to Partner Resource Director Traci Wilk. (Trial Tr. 1838). Wilk, in turn, requested information as to whether Agins had been scheduled for work that day and if so, had he reported to work on time. (CP Ex. 11). Wilk admitted that she was trying to determine if Agins was distributing flyers while working. (Trial Tr. 1840). But Wilk could not "recall" whether it was her normal practice to make such inquiries in situations where an employee was observed on the street handing out invitations for some matter not relating to unions. (Trial Tr. 1840). It seems clear based on this record evidence that her inquiry reflects Respondent's animus toward Agins, inasmuch as she was attempting to "catch" Agins in some sort of violation, with an eye towards possible discipline. However, that was not possible on that occasion, because it turned out that the promotion occurred on Agins' day off. (CP Ex. 11). Still another reflection of animus towards Agins in particular can be seen in the visit to his store by Regional Vice President Jim McDermet sometime between June and

November 2005. On that occasion, McDermet came up to Agins and provocatively asked him if he liked working at Starbucks. (Tr. 923-924).

Another significant piece of evidence showing animus and, in fact, the real reason for Agins' discharge is the PAN Separation Notice reflecting his discharge. (G.C Ex. 77); 354 NLRB at 903. This document was prepared by SM Warner. In the comments section explaining why Agins would not be eligible for rehire, one of the two reasons listed is "Partner strongly supports the IWW Union" [emphasis added]. . (G.C Ex. 77); 354 NLRB at 903. Counsel for the Acting General Counsel submits that one could not find a more damaging admission reflecting Respondent's animus towards Agins than an official company separation notice stating that Respondent would not rehire him in part because of his union support. The strong inference that the reason for his ineligibility for rehire was one and the same as the reason for his discharge was not in any way dispelled by Respondent. SM Warner did not testify. The attempt by DM Smith to "explain" Warner's notation and his state of mind was not only incredible but was properly rejected as inadmissible at trial. (Trial Tr. 2506-2508); 354 NLRB 908.

The timing of Agins' discharge is relevant as well. He was fired shortly after the November 2005 period during which the IWW Starbucks Union clearly accelerated its organizing campaign. The union members at Union Square East announced their membership and demanded to meet with management on November 18. 354 NLRB at 883-884. In tandem with the NLRB complaint, which also happened to issue on November 18, 2005, Agins and others participated in the union button solidarity action on November 21. 354 NLRB at 902. At the end of that same week, the union activity culminated in the large all day demonstration and news conference on November 25,

2005, “Black Friday”. (Trail Tr. 560-562, 1513-1514). The union activity of that week generated both news coverage and responses from the top management of Starbucks. (Trial Tr. 563564, 1514, 2419, 2448; G.C. Exs. 10, 22, 63, 64). Agins was fired just weeks after this flurry of activity, and Agins was one of the leading union adherents who participated in virtually all of those activities. *Starbucks Corporation, supra* at 74.

All of the above described evidence strongly supports a finding that Respondent knew of Agins’ union activities, harbored animus towards him because of those activities and fired him because of the extent of his union support and activities. Nor does the testimony of Respondent’s witnesses in support of its defense survive scrutiny.

Agins credibly testified that the only reason the two managers gave him on December 12, 2005 for his discharge was that he was disrupting business on November 21, 2005. In this regard, to the extent that Peter Montalbano testified about the same event, Montalbano’s testimony was consistent on all material points with that of Agins. Montalbano of course, did not hear a good deal of the conversation between the two managers and Agins. Neither Julian Warner nor Nicole Mozeliak (formerly Wiede),<sup>12</sup> a current manager in Partner Resources testified for Respondent about that December 12 meeting. (Trial Tr. 377, 491-492). While Warner is a former supervisor no longer employed by Starbucks, the same cannot be said for Nicole Mozeliak who Wilk testified was a current manager in Partner Resources. (Trial Tr. 377, 491-492). Hence an adverse inference is warranted regarding any testimony that Mozeliak might have offered regarding the December 12, 2005 meeting with Joe Agins. *See International Automated Machines*, 285 NLRB 1122 (1987), enfd. 861 F. 2d 720 (6<sup>th</sup> Cir. 1988). In any event,

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<sup>12</sup> See G.C. Ex 61/ALJ Ex. 1D at par. 1—Traci Wilk refers to the discharge of Agins and mentions that “PRM Nicole Wiede” served as a witness.

Agins' testimony about the reason given to him for his discharge on that day stands uncontradicted.

Respondent called DM Smith to testify as to the reasons for Agins' discharge. Counsel for the Acting General Counsel submits that Smith's testimony simply cannot be relied on by Respondent to meet its *Wright Line* burden of showing it would have fired Agins even absent his union activities. Smith was wholly incredible on several key points concerning the alleged decision-making process leading to Agins' discharge. Smith cannot be credited where his testimony differs from that of Agins. Agins clearly and credibly testified that neither Smith nor any other manager spoke to him regarding the November 21, 2005 button incident until the day he was fired- December 12, 2005. (Trial Tr. 943- 944, 950). Smith, while initially claiming that he spoke in person with Agins regarding the reasons for his discharge before December 12, gave versions of that alleged conversation and of the November 21 incident which are demonstrably false. (Trial Tr. 2502, 2504, 2523). In this regard, Smith first claimed that he sat down and spoke to Agins after he received a phone call about the incident, and that "we" decided to move to termination. (Trial Tr. 2502, 2502).

The fact that Smith's claim about speaking directly with Agins was a fabrication first became obvious when Smith described the incident that he spoke with Agins about as the one where Agins threw a chair. (Trial Tr. 2502). There is no evidence that the November 21 button action or any other incident involving Agins pertained in any way to Agins throwing a chair. At that point it became clear that Smith was not recalling any real event and ALJ Landow termed his testimony on this point "confusing". (Trial Tr. 2504). Smith responded with the less than credible statement, "Obviously I had some

type of conversation with Joe about the incident”. (Trial Tr. 2504). Smith just added to his incredibility when on cross examination he offered that the incident in November 2005 which led to Agins’ discharge was one where Agins had been “on the clock,” when in fact Agins was off duty and came into the store with his fellow union members. (Trial Tr. 2522, 2523). It should be quite clear from the above that Smith’s testimony that he actually met with Agins after the November 21 button action is a recent fabrication. Moreover, Smith’s inability to describe what allegedly occurred on November 21 regarding Agins undercuts Respondent’s assertions that Warner and Smith made the decision to discharge Agins and that the decision was made for non-discriminatory reasons. 354 NLRB at 903.

Smith also falsely denied that he had told Agins in May 2005 that he would tear up a planned corrective action about a prior incident on or about May 14, 2005 involving Agins and ASM James. (Trial Tr. 2473). Significantly, that incident occurred before Respondent learned on May 28, 2005 that Agins was a member of the IWW Starbucks Workers Union. (Trial Tr. 2535). In that incident, James sent Agins home before the end of his shift. Agins felt James had been disrespectful to him in front of customers when he requested her assistance. (Trial Tr. 952). James accused Agins of insubordination because he had cursed at her under his breath, allegedly threw a blender into a sink and allegedly refused to leave the premises after she requested he do so. Agins admitted the cursing under his breath but denied that he threw a blender or refused to leave once James asked him to close his till and clock out. (Trial Tr. 954-955). But the point is that after all was said and done, although Agins was sent home that night, he was reinstated to work in a matter of days by the DM Smith, after Smith heard Agins’ version of the

incident. (Trial Tr. 956-959). Agins clearly and credibly testified that Smith further promised Agins on that occasion in May 2005 that he would tear up and not issue the corrective action that apparently had been prepared. (Trial Tr. 958, 987-988). Agins's recollection is corroborated by the fact that the corrective action document, while apparently not torn up, was apparently not issued either. It bears no signatures or dates on the bottom portion, indicating that it was never administered to an employee. 354 NLRB at 908. ALJ Landow, as seems reasonable, credited Agins over Smith regarding what occurred as a result of the May 2005 incident, then Agins was not on final warning and had not been formally disciplined for the earlier incident. 354 NLRB at 908-909.

The import of this is that there existed a stark contrast with how Respondent treated Agins before it had clear knowledge of his union support compared with how Respondent treated him after that point in time. The first incident (May 14), even though it occurred while Agins was on duty in the store and ASM James accused him of insubordination, did not result in formal written discipline. The second incident (November 21), occurring after Agins had been openly engaging in union activity for six months, and which occurred on his off duty hours, resulted in his dismissal.

The more lenient treatment Agins received in May 2005 before his union activities also appears more in keeping with how Respondent has treated other employees not involved in any union activity when they engage in some form of outburst in their store. In this regard, the personnel files of several Starbucks employees introduced into the record suggest that Respondent could not make out a *Wright Line* defense that it consistently discharges employees who engage in serious outbursts while on the job. Instead these records indicate that Respondent has meted out lesser discipline for such

offenses even if repeated by employees who have other discipline in their files. For example, employee Troy Bennett received only a written warning for cursing at other partners and customers while on duty and for yelling at the supervisor. (GC Ex. 67 at Bates # 20574). Employee Noah Francis, after receiving a final written warning on 1/26/07 for making sexually suggestive comments to customers, did not get fired but received yet another written warning, when he, just two weeks later on 2/12/07, engaged in unwanted physical contact and danced with a customer, leaving the customer and her husband upset. (GC Ex. 68 at Bates #20991 & 20989). Carlos Martinez received a written warning for telling a supervisor that no one wants to work with her and he doesn't care and then just received another written warning after he refused to work after being asked to clean. He told the supervisor he "wasn't going to clean for no one". (GC Ex. 74 at Bates # 17836 & 17832). Kevin Bruckner received a written warning for using the "F" word to an ASM; another written warning for getting upset over a conversation between the ASM and a co-worker; another written warning for telling a co-worker what a bad job the worker was doing in front of customers, and yet another "final" written warning for saying "you can fucking write me up if you like" in front of other customers and employees. (GC Ex. 66 at Bates # 27344, 27345, 27332; 27318; & 27321). (See also GC Exs. 69-73, 75-76).

In light of the above-described evidence of employees treated more leniently for serious "outburst" types of offenses, Respondent's introduction of other personnel files which purport to show disciplinary events consistent with that of Agins would not be sufficient to satisfy its burden of proof under *Wright Line*. Assuming that the files collected in Respondent's Summary Exhibit 53 reflect that Respondents has fired other

employees for conduct similar to that of Agins, the evidence introduced by General Counsel shows that Respondent has also tolerated similar or worse conduct. In *Avondale Industries*, the Board noted that an Employer's *Wright Line* defense is not met simply by showing examples of consistent treatment or even by showing that such examples outnumber the examples of disparate treatment. Rather, Respondent must show that the instances cited by the General Counsel are so few as to be an anomalous departure from what is an otherwise general consistent past practice. *Avondale Industries*, 329 NLRB 1064, 1065-1066, fn.11 (1999). See also *Regional Medical Center at Memphis*, 343 NLRB 346, 363-364 (2004); *Septix Waste, Inc.*, 346 NLRB 494, 496-497 (2006). Counsel for the Acting General Counsel submits that in keeping with the argument above, Respondent would not be able to meet that burden here if the alternative *Wright Line* analysis were to be applied to the discharge of Agins.

Further, it is urged that, the Board review ALJ Landow's analysis of Agins' discharge under the *Wright Line* standard and adopt her alternative finding that Starbucks unlawfully discharged Agins for his ongoing protected union activity. 354 NLRB at 899-906, 907 fn. 55, 908-909.

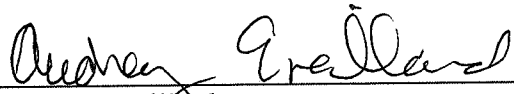
## V. CONCLUSION

For the reasons set forth above, it is respectfully requested that the Board should adopt the "grossly or seriously disruptive" standard to determine whether Agins' conduct on November 21 caused him to lose the protection of the Act and the Board should find, based on the totality of the circumstances, that Agins' outburst on November 21 was not grossly or seriously disruptive to the business operations of Starbucks. Alternatively, the

Board should adopt ALJ Landow's finding that, under the *Wright Line*, Starbucks unlawfully discharged Agins for his ongoing protected union activity.

Dated at New York, New York, this 28<sup>th</sup> day of January 2013.

Respectfully submitted,

A handwritten signature in cursive script, reading "Audrey Eveillard", written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S STATEMENT OF POSITION TO THE BOARD ON REMAND, Case No. 02-CA-037548 was served by E-Filing, and E-mail on this 28<sup>th</sup> day of January 2013, on the following parties:

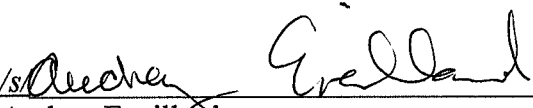
***Via E-Filing:***

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